

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

JOHN T. JONES CONSTRUCTION CO.,
INC.

and

Cases 17-CA-22607
17-CA-22614
17-CA-22708

CARPENTERS' DISTRICT COUNCIL OF
KANSAS CITY & VICINITY, affiliated
with UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO

Ann Peressin and Susan Wade-Wilhoit, Esqs.,
for the General Counsel.
Gregg J. Cavanagh, Esq., for Respondent.
Michael J. Stapp, Esq., for the Charging Party.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 17-CA-22607 was filed by the Carpenters' District Council of Kansas City & Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein the Union, on February 11, 2004.¹ The Union filed a first amended charge and a second amended charge in Case 17-CA-22607 on March 8, 2004 and April 1, 2004, respectively. The Union filed a charge in Case 17-CA-22614 on February 17, 2004 and a charge in Case 17-CA-22708 on April 21, 2004. The Union additionally filed an amended charge in Case 17-CA-22708 on May 26, 2004. Based upon the original and amended charges filed in Cases 17-CA-22607, 17-CA-22614, and 17-CA-22708, the Regional Director for Region 17 of the National Labor Relations Board (the Board), issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing on May 28,

¹ Unless otherwise stated, all dates referencing October, November, and December refer to 2003 and all other dates are in 2004.

2004. The second consolidated complaint alleges that John T. Jones Construction Co., Inc. (Respondent) violated Sections 8(a)(1) and (3) by terminating the employment of Brian Estenson, Ryan Reynolds, Edgardo Rosa,² Sterling “Jason” Hammons, and Bob King. The consolidated complaint further alleges that Respondent violated Sections 8(a)(1) and (3) of the Act by transferring and assigning more onerous working conditions to Brian Estenson and by assigning more onerous working conditions to Bob King. The consolidated complaint additionally alleges that Respondent, acting through seven alleged supervisors and agents, violated Section 8(a)(1) of the Act by engaging in 14 separate incidents of violative conduct on varying dates between mid-October 2003 and April 5, 2004.

This case was tried in Springfield, Missouri on June 15, 16, 17, and 18, at which all parties had the opportunity to present testimony and documentary evidence to examine and cross-examine witnesses, and to argue orally. General Counsel, the Union, and Respondent filed briefs, which I have duly considered. On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, a corporation, with headquarters in Fargo, North Dakota, has been engaged in the construction of heavy concrete projects and wastewater treatment facilities, in various midwestern states, including a jobsite in Springfield, Missouri that is identified as the Southwest Wastewater Treatment Plant, herein called SWWTP. During the twelve-month period before the issuance of complaint in this matter, Respondent purchased and received at SWWTP goods valued in excess of \$50,000 directly from points located outside the State of Missouri. The Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent was founded in the early 1950’s and maintains its headquarters in Fargo,

² General Counsel withdrew the allegation involving the discharge of Edgardo Rosa during the trial.

³ Fourteen days after the deadline for post-hearing briefs, Respondent filed a Motion to Supplement Record and moved to include into evidence Respondent’s time cards for the weeks ending October 11, 2003 and October 18, 2003. Respondent’s counsel asserts that during the course of the trial, Counsel for the General Counsel represented that all of Respondent’s time cards for the time period between August 1, 2003 and February 7, 2004 would be offered into evidence. Counsel argues that it was only during the preparation of the brief, that he discovered that the time cards for these two weeks were not included in General Counsel’s exhibits. Counsel for the General Counsel does not oppose this motion and requests that these additional time cards be admitted as Joint Exhibit 1. There being no opposition to Respondent’s motion, the motion is granted and these documents are received as Joint Exhibit 1.

North Dakota. Respondent is a general contractor engaged in the construction of heavy concrete projects with a specialty in the construction and remodeling of wastewater treatment facilities throughout the United States. Since about May 2003, Respondent has been engaged in the construction of the Southwest Wastewater Treatment Plant in Springfield, Missouri, herein called SWWTP. The contract valued at \$23,900,000 involved rehabilitation and reinstallation of new clarifier equipment, retrofitting screw pumps, erecting two new final clarifiers, constructing improvements to the existing four clarifiers, constructing portions of the aeration basin, and implementing the addition of two large tanks or primary clarifiers. Additionally, the project required the construction of other structures including the partial flumes, the influent distribution box, the primary sludge and pumping stations, the water control, the polymer, the electric building, the influent pumping station, and the primary influent distribution box.

There are normally two classifications of work performed on a job site. The civil work is all of the concrete work that is performed for the construction on a plant. The mechanical work involves all of the attaching and adjoining of mechanical equipment, piping, and accessories that completes the construction of the tank. Traditionally, laborers, carpenters, cement finishers, and operators work on the civil side of the production, while millwrights and pipe installers work on the mechanical side of the project.

There are a number of individuals who are considered as Respondent's core staff. These individuals are normally classified as foremen and they work on different projects throughout the country as needed. Roger Guida, herein Guida, has been employed with Respondent for over thirty-five years and has served as a project manager for 15 years. From May 2003 until mid-March of 2004, Guida worked as the project manager for the Springfield SWWTP project. Dan Yocom held the position of superintendent for the civil side of the project and Mark Grisvold held the position of mechanical superintendent. Yocom has been employed with Respondent since 1984 and first served as a superintendent for Respondent in 1996. Sherry Grisvold served as office manager and Mike Jones functioned as the cost controller for the SWWTP project. While Curtis Guida only began working as a foreman at the SWWTP in January 2004, he had been employed with Respondent for twenty-three years and last worked as a superintendent for Respondent in Fraser, Colorado. Paul Johnson has been a foreman with Respondent since 1988.

B. Brian Estenson

1. Estenson's Union Activity

Brian Estenson, herein Estenson, has worked as a carpenter for approximately 10 years. He has been a member of the Union for approximately 3 years and he began working at Respondent's SWWTP facility on July 7, 2003 as a form carpenter. He testified that when he applied for work with Respondent he did not tell anyone that he was a member of the Union and he did not list union references on his application for fear that he would not be hired. Approximately two to three weeks after he began working on the project, he began talking about the Union with other employees on the job. Ryan Reynolds testified that Estenson was the first person to tell him about a union campaign on the jobsite. Reynolds

was unaware of any Union activity prior to Estenson's arrival on the job site. Employee Bob King also testified that he first heard about the Union when Estenson began working on the job site and he heard Estenson discussing the Union with other employees.

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2. The October 8th Blowout

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Estenson testified that he had safety concerns about his work on the project. Specifically, he was concerned that he and other employees were working on a cluttered job site without ladders. He also explained that while under OSHA standards, a "tie-off" or body harness is required for employees working higher than six feet, proper tie-off's were not available for employees on the jobsite. Estenson recalled reporting these concerns to Superintendent Yocom as well as to Foreman Floyd Coons and Lead Man Bob Dodge. Estenson also raised these concerns during the regularly scheduled safety meetings. Reynolds and King corroborated hearing Estenson raise his concerns to Yocom and other foremen conducting the safety meetings. Reynolds also recalled that during the meetings, other employees voiced their agreement with Estenson.

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In the building of a concrete structure, wall ties are used to connect or tie the forms together while the concrete "sets up." The wall ties are necessary because of the pressure caused by the concrete against the form during the hardening process. King explained that a "blowout" occurs when the forms break, causing the concrete to spill out. On October 8, Estenson was instructed to form a concrete wall with what he described as "homemade" or welded walls ties. Estenson told Dodge that because the wall ties would not withstand the pressure of the concrete within the wall, the ties would break at their welded points, causing the wall to burst and the concrete to pour out. Dodge told Estenson that he had already voiced this concern to Coons and Yocom and Yocom had nevertheless instructed them to proceed with the welded ties. Estenson, however, insisted that he and Dodge talk with Coons about these concerns.

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Coons testified that widths of the walls are usually evenly sized and it is preferable to use wall ties that are manufactured to fit those sizes. The 19-inch wall that was under construction in October was an odd size that would have required ordering 19-inch wall ties. Rather than ordering the manufactured ties, management directed the wall to be poured using welded ties. King testified that he has worked in carpentry for 12 years and specifically with concrete for 10 years. King explained that the correct procedure is to use manufactured ties rather than duplicating ties or welding ties together. Coons recalled that all of his employees voiced their objections to using the welded ties rather than manufactured ties. Coons took his concerns and those of his employees to Yocom and suggested that they hold off on completing the wall until the manufactured wall ties could be ordered. Coons recalled that Yocom responded: "No, use the welded tires, I've got to have it done, Floyd. If it is not done you've got no job."

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Despite the employees' objections, the pour proceeded as planned on October 10. King estimated that the pour involved approximately 71 yards of concrete. He explained that an average concrete truck contains 8 to 10 yards of concrete. Ryan Reynolds testified that their crew was rushed to get the wall poured before the weekend because the "Fargo guys"

had to go home for three days and they wanted it poured before they left. Reynolds also recalled that they were pouring the wall before they had a walking board or scaffolding and the crewmembers only had 3-inch forms upon which to stand. At a point in which they were approximately halfway into pouring the wall, the wall began to blow. King recalled that the workmen first heard a large pop as though something had broken and the center wall began to bow outward. Coons sent Estenson to the bottom of the wall to brace the wall. Working from inside the box structure adjoining the wall, Estenson attempted to push back into place one of the 2 by 4 foot wall braces. Reynolds estimated that while Estenson was attempting to prevent the wall collapse, he was standing halfway below the 16-foot structure. King estimated that there were 18 feet of wall around Estenson and another 15 feet below him. Reynolds estimated that if Estenson had remained in the same place when the wall blew, he would have been at a depth of approximately 24 feet with 40 yards of concrete covering him. After Estenson finished his attempt to brace the wall and he had climbed up the wall, the forms collapsed and the liquid concrete spilled out of the walls. The explosion of concrete shook the wall the employees were standing on, which was only eight inches wide. While Estenson was wearing a harness, the harness was not attached to anything. King recalled that the concrete began rushing out of the wall with such force that a whirlpool was created. He likened it to the flushing of a giant toilet. Coons testified that eleven of the ties broke first and then 61 yards of concrete spilled out and into the 18-inch pipe connecting two of the clarifiers. King remained at the jobsite until 6:00 a.m. the next day for the initial clean up. Coons described the incident as “probably the biggest and worst blowout” that he had ever seen in his 22 years of construction. Coons directed employees to crawl into the 18-inch pipeline that had been filled with concrete. By using a special drill, they were able to chisel out the concrete that had hardened in the pipeline. He recalled that the cleanup from the blowout was still on going at the time of his layoff in December. Guida acknowledged that as of the date of the June 2004 hearing in this case, the total cost for the blowout had not yet been determined, however it was anticipated that the costs would exceed \$150,000.00

3. The Events Following the Blowout

When Estenson returned to the work site on October 13 and the Monday following the blowout, he observed Yocom at the site of the blowout. When Estenson observed Yocom on top of the rebar with no harness, he pointed out to Yocom that he was working without protection and without observing the tie-off rule. During that same day, Estenson also took several photographs of the worksite where the blowout had occurred as well as other conditions that he believed to be safety violations on the work site.⁴

King testified that during the week following the blowout, there was a day in which he had two conversations with Coons and Yocom concerning Estenson. At the time of one of the conversations, King recalled that he was “rounding up some cable and angle iron with holes.” He explained that he was attempting to hook the cable through angle iron drilled into the wall, which would provide a means by which the employees could be “hooked off” as they were setting up their shoring in the clarifier. When Yocom and Coons asked why he was doing so, he explained that it was at Estenson’s request. In response, they asked King if he had seen

⁴ Ryan Reynolds testified that he witnessed Estenson’s photographing the work site.

Estenson taking photographs. King confirmed that he had. Yocom then told King that if he were to see Estenson with the camera, he should try to grab it, take it away from Estenson, and then dispose of it. Yocom added that he “didn’t want this kind of stuff happening on the jobsite.” King recalled that Yocom also told him that he would be willing to pay someone to get into a fight with Estenson as a means of firing Estenson. Yocom added that the person involved in the fight would have to be fired but could be rehired. King also recalled that Yocom added that he was going to transfer Estenson from their crew and transfer him to Foreman Kim Barsness’ crew where “they could keep him on the ground” and “work him hard.” King also recalled that in one of the conversations that same day, Yocom mentioned that he was going to call the company’s attorney to see if they could get rid of Estenson legally because he (Yocom) “knew he was union.”

When Estenson attended the safety meeting two days later, he raised his concerns about the wall ties that had been used as well as his concerns about the failure to have complete tie-off’s for employees when needed. He also raised concerns about the clutter on the job site and the oxygen and acetylene bottles or torches that were not properly stored.

While Coons acknowledged that he did not personally see Estenson taking photographs on the job site, he heard from several of the employees that Estenson had a camera and was taking photographs. He also recalled a conversation with Yocom on either Wednesday or Thursday after the blowout in which they discussed the possible reasons for Estenson’s taking the photographs.

After the blowout, Coons could not complete the wall as planned and he had to shift his crew’s work to erecting a shore trough slab that required working 8 feet above ground. Some of the employees, including Estenson, voiced concerns about the tie-off procedure and the need for a cable to be strung high enough above the 8 feet in order to allow a proper tie-off. When Coons told Yocom that they needed to install the cable, Yocom told Coons to remove Estenson from his crew and send him to Foreman Kim Barsness’ crew where he could work on a flat surface and where he would not perform any work requiring a tie off. Yocom told Coons that he would move Estenson to the area pouring slabs and would then lay him off. Yocom added that he didn’t want anyone on his crew taking pictures and sending them to OSHA.

4. Estenson’s Transfer

Estenson recalled that he had already started the installation of the cable line for the tie-off when Coons told him that he was transferred to Barsness’ crew. When he reported to the Barsness’ crew, Estenson began a job that was known as “stripping keyway,” which involved using a steel bar or roto hammer to pry out little pieces of wood that are embedded between the rebar and concrete. Estenson testified that this work was physically more difficult than the work he had performed for Coons and it was a task not usually given to a carpenter with ten years of experience. King explained that a carpenter rarely uses a sledgehammer or pry bars and such work is typically performed by a laborer. Sterling Jason Hammons worked with Estenson on Barsness’ crew and observed the work to which Estenson

was assigned. Hammons testified that for the first week and a half that Estenson was assigned to Barsness' crew, he was assigned to jobs that were normally performed by laborers. It was only three days before Estenson's layoff that Estenson worked with Hammons performing carpenters' work. Hammons explained that Estenson was able to do so because he requested Estenson's assistance. Because he found it unusual for a carpenter to perform laborers' work, Hammons questioned Barsness. He recalled that in October, he asked Barsness why he was wasting Estenson by having him perform laborers work rather than carpentry work. Barsness replied that Yocom told him to put Estenson on every "shit job there was out there."

Troy Haakenson observed Estenson working by himself to tear out and strip forms. Haakenson explained that this work was usually assigned to "a couple of laborers" rather than to a carpenter. Haakenson asked Barsness why a carpenter was tearing forms by himself. Barsness responded that the "office" told him that Estenson was to have only the worst jobs and he was not to have any work above ground because he had taken pictures.

On October 17, Estenson wrote OSHA to complain about safety conditions on the jobsite. On October 20, he received a telephone message that an OSHA inspector would visit the jobsite within three days. Estenson also recalled that he was assigned work to clean up ahead of the OSHA inspector. After the OSHA inspection, Yocom told Coons that Respondent suspected that Estenson made the call and sent the photographs to OSHA because the OSHA inspector "fingered" Estenson. Yocom explained to Coons that the inspector pointed out Estenson's name from a list of employees.

5. Estenson's Layoff

On October 31, Yocom gave Estenson his check and informed him that there was going to be a layoff and that the floor crew would finish the project that he was working on. Estenson testified that at the time of his layoff, he was not the least senior employee and that at least 20 employees had been hired after him. King testified that there was plenty of work left to do at the time of Estenson's layoff. Specifically, King recalled that the available work involved: (1) shoring slabs; (2) finishing up and capping scum boxes; and (3) starting the work on the partial flume and the influent pump station.

Guida denied any involvement in the decision to reassign Estenson and identified Yocom as making the decision for his layoff. Guida denied knowledge of Estenson's raising safety concerns or taking photographs on the job site. While he acknowledged that there was an OSHA inspection and resulting citation, he denied any knowledge of Estenson's having filed the OSHA complaint. Guida asserted that while work continued on the project after Estenson's layoff, Respondent had a full staff and did not need Estenson's services.

Yocom testified that he transferred Estenson to Barsness' crew because he ran out of work for Estenson to do in what he described as the "finals." He also testified that Estenson was laid off because there was no other work for him to do. Yocom also confirmed that when he completed Estenson's notice of separation form, he indicated that Estenson would not be rehired in the future. In explaining why he did so, he testified: "I didn't have anywhere else to put him. And he was sort of hard to work with." When asked to explain, he only stated

that Estenson sometimes had “personality conflicts” and that employees King, Reynolds, and Eddy Rosa had personality conflicts with Estenson.

C. Ryan Reynolds

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1. Background

10 Over the past five years, Ryan Reynolds, herein Reynolds, has worked as a carpenter for several companies in Springfield, MO. He also served as an infantryman in the military and is scheduled to begin law school in the fall of 2004. Reynolds worked for Respondent from late June 2003 until February 2004.

2. Reynolds’ Union Activity

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20 In late January 2004, as Reynolds and Bob King signed their time cards in the job trailer, Yocom asked whether they were planning to attend a union meeting. Reynolds testified that Yocom specifically asked if their crew planned to go to the meeting or if they were aware of a meeting. King denied any awareness of the meeting or any plans to attend a meeting. While he had previously planned to attend the meeting, Reynolds decided against attending the meeting. A couple of days later, however, Reynolds contacted Union Organizer Art Kessler. Reynolds testified that he contacted Kessler because he had decided that he wanted to organize the job and secure better treatment on the job and to obtain “some kind of fair labor standards.”

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30 On the day that Reynolds met with Kessler, he called in “sick.” Kessler gave him various union literature, pamphlets, and stickers. Before returning to work on January 28, he put the stickers on his hard hat. He placed two of the biggest stickers on both the front and the back of his hard hat. The wording on the three-inch stickers included “Union Yes” with a check box as would appear on an election ballot. Reynolds also placed an additional five-inch union sticker on the front of his hard hat, bearing the words “Organize or Die.” When he arrived at the job site, he saw Foreman Paul Johnson, who asked where he had been the previous Monday. Reynolds told Johnson that while he had been sick, he had met with not only the union organizer, but also the OSHA investigator concerning Estenson’s case.

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3. Respondent’s Knowledge of Reynolds’ Activity

40 Reynolds recalled that “a couple of hours” after he began work, he saw Foreman Curt Guida. Because he needed to know what he was to do next on the job, he approached Guida. Without saying a word, Guida spit toward Reynolds’ face. Reynolds recalled that he was standing approximately three feet away from Guida at the time.

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Bob King testified that on the same day that Reynolds wore the union stickers on his hard hat, Yocom asked him how long Reynolds had been in the Union or if he had always been in the Union. King responded only that Reynolds was trying to organize for the Union. King also recalled that during the same time that Reynolds first wore the union stickers on his hat, he had a conversation with Foreman Mark Reimers near the tool trailers. During the

conversation, Reimers remarked: "rumor has it that your boy's gonna get fired." Reimers then specifically mentioned Reynolds by name.

4. Reynolds' Termination

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Approximately a week after the incident with Curt Guida, Reynolds told Roger Guida that he would be late for work because of a scheduled dental appointment. Guida responded that he need not come in to work because he was laid off. Reynolds recalled that he began to beg for his job; telling Guida that he had just repaired both his cars and he had no money. Reynolds testified: "He said not to worry, there are union companies hiring right now."

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Guida testified that earlier in the construction process, he directed a daily monitor for attendance. Guida recalled that during Reynolds' last week of employment, he missed three out of five days. Guida asserted that he had not heard from Reynolds and he reviewed the attendance log, containing numerous absences for Reynolds. Guida testified that he decided to terminate Reynolds. Guida maintained that while he prepared Reynolds' notice of separation on January 29, 2004, he never saw Reynolds on the job site again to give him the notice. Guida denied that Reynolds talked with him about a dental appointment and he denied that he had any conversation with Reynolds.

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Yocom recalled that there had been occasions when Reynolds asked to take time off for tests for school. Yocom testified that while he planned to terminate Reynolds for absenteeism, he did not get the opportunity because Reynolds never showed up. Yocom asserted that Reynolds came to the job site to pick up his tools but never spoke with Yocom.

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D. Sterling Jason Hammons

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1. Background

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Sterling Jason Hammons worked as a carpenter for Respondent from May 2003 until February 2004. Although Hammons has been a member of the Union for approximately 20 years, he did not include union references on his application when he applied to work for Respondent. He testified that he did not tell anyone that he was a member of the Union when applying because he didn't feel that Respondent was sympathetic to the Union. In July 2003, he began to talk with other employees about the Union. He recalled a conversation that he had with employees Troy Haakenson, Dan Frye, and James Futch as well as Foreman Kim Barsness and Superintendent Mark Grisvold in July 2003 after the Union delivered pizza to employees on another crew at the job site. Frye commented that since Hammons had a democratic candidate's bumper sticker on his car, he was probably sympathetic to the Union. Although Hammons didn't respond, Barsness asked Hammons if he knew the guys who brought the pizza. Hammons responded that he probably did. Barsness then asked if Hammons was a part of the Union, as he knew the guys who brought the pizza. Hammons told Barsness that he didn't discuss politics at work and he would discuss the subject with him later.

2. Hammons' Union Activity

In January 2004, Hammons not only attended Union meetings, but he also passed out Union authorization cards and talked with other employees about the Union prior to the meetings. He testified that he also showed his support for the Union by putting Union stickers on his truck and by wearing a Union vest to work on February 13. The black vest bore a 10-inch Union logo in red, white, and blue colors on the back. The front of the vest contained a four-inch Union logo stating "Organize or die." Hammons also wore Union stickers on both his ball cap and his hardhat. He estimated that there were approximately 6 Union stickers on his hardhat. Hammons recalled that this had been the first time that he had worn any kind of Union paraphernalia to work. He recalled seeing Roger Guida, Dan Yocom, and his Foreman Mark Reimers while wearing the Union paraphernalia.

Just after the workday startup at 7 a.m. on February 13, Foreman Reimers told the work crew that he was going to be away for the next week and he gave them their work assignments for the full week that he would be away. At approximately 2:30 p.m. Yocom came to Hammons and told him that at Roger Guida's direction, he was laid off because there was no more work. Hammons testified that he was surprised because there was still work to do. He explained that the crew still had pours inside the tank to which he was assigned and there was an additional structure to be built. He was also surprised by the layoff because only three months earlier, Barsness told him that there was a "good year's worth of work" remaining. At the time of his layoff, Hammons was neither the least senior employee nor the least senior carpenter and he had no prior discipline. When Hammons returned to the jobsite the following Monday, he saw carpenters performing the same work that he had performed.

King testified that one day during February 2004, he was working with Troy Haakenson when Yocom approached them. Yocom asked them if they knew who was responsible for putting Union stickers on the equipment including the gas cans, forklifts, and crane. Yocom then added that he "pretty much knew who was doing it, it was the union guys Jim Michaels and Jason Hammons." King added "And then in that same conversation Yocom also told me that they were trying to get rid of Jason Hammons, doing it legally, but also setting him up to fail." King recalled that Yocom commented that it was getting really heavy on the job site because of the Union and the back pay issue. Yocom added that he needed a lawyer sitting with him at all times to watch his back. Yocom continued to talk about the Union and predicted that it didn't matter if there was a 60 percent or majority vote, Respondent would never go union.

Guida testified that both he and Yocom made the decision to layoff Hammons because a reduction in force was needed. Both Yocom and Guida denied any knowledge of Hammons' union activity or affiliation.

E. Bob King

1. Background

Bob King began working for Respondent as a laborer in December 2002. Prior to the

time that his employment terminated on 30, 2004, King was promoted to a laborer foreman in June 2003 and to a carpenter in December 2003.

2. Respondent's Actions in Response to the Union

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King received an invitation to attend a Union meeting in late January 2004. While he asked three other employees to join him, they did not. King recalled that the day before the meeting, he and Ryan Reynolds were in the job trailer to sign their time cards and to pick up their checks and Yocom was present in the trailer. Yocom specifically asked King if he were planning to attend the Union meeting that was to be held the following Saturday. Although King replied that he was not, Yocom advised him that if he did attend he should park elsewhere to prevent his car from being seen "while they were driving by."

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15 The week following the meeting, King was working by the tool trailer at the north of the job site. When no one else was present, Yocom asked King if he had in fact attended the meeting and if he knew who had attended. King told Yocom that he had not attended and he did not know who had actually attended the meeting.

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During a safety meeting in February, Roger Guida talked with employees about their frustrations with how taxes had been withheld from their checks. Guida told them that if they had any problems with anything, including not being paid the correct rate for their work, he would talk with them individually. Later that same day King spoke with Guida in his office. They discussed employees' complaints about not receiving the prevailing wage rate for carpenter work. During this same conversation, Guida asked King if he knew who was responsible for putting the Union stickers on the equipment. King told Guida that he did not know. Guida then asked King if he had been contacted by the Union and King confirmed that he had. Guida also asked if other employees had been contacted as well and King replied "most likely."

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Haakenson also recalled that Guida spoke to the employees during a February safety meeting and told them that they could come to talk with him if they had a problem with their wages. When Haakenson went to Guida's office the next day, he asked Guida what he wanted to discuss with employees one-on-one. Haakenson recalled that Guida told him that he could do whatever his heart told him to do as far as the Union and that he knew all the Union operators. When Guida suggested that Haakenson might be wearing a tape recorder, Haakenson assured him that he was not. Haakenson recalled that during the conversation, Guida told him that if he didn't like what he was doing, he could go elsewhere. While Haakenson did not understand what Guida meant, he recalled Guida's telling him that he was "going to bring some boys from up north and get the job done right."

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King attended a second Union meeting on February 5, 2004. King explained that while he did not tell employees that he had attended this second meeting, his attendance "sort of leaked out." After that time, other employees, as well as Foreman Paul Johnson, began to refer to him as "Union boy."

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King recalled a conversation with Foreman Paul Johnson on the jobsite in late

February when Johnson asked King what he thought about the Union. King acknowledged that he supported the Union, pointing out that Union medical benefits were better than what he could get from Respondent.

5 When Johnson was out of town, he kept his motorcycle in King's garage. Around March 5, Johnson suggested that he would repay King by taking him out to play pool. King accepted and they met at a local bar in Springfield. King recalled that this occurred on a day when they had been rained out and it may have been on a Friday. While there, Johnson asked King if he were a Union cardholder. King told him that he was not. Johnson then continued
10 by asking King why he thought that the Union wanted to be involved with Respondent. King told him that he didn't know. Johnson added that he had heard from other employees that King "was Union."

15 The next scheduled workday,⁵ King began the day working with Johnson who normally gave his assignments. During the day however, Curt Guida came to the work area and told King that starting the next day, he would work on another job site setting up forms and building walls. Guida assigned him to build an inside gang form wall. While King had previously built this kind of wall, he had always done so with other employees. He testified
20 that he had never built this kind of wall by himself. King explained that the wall was sixteen feet tall and is constructed with a row of 4 by 8 foot steel forms topping a row of 8 by 12 foot steel forms. The two rows of forms are connected by nuts and bolts. King estimated that each section of the wall containing the 4 by 8 and the 8 by 12 foot forms weighs 3500 pounds.
25 In order to build the wall, King moved the forms from a location 300 feet uphill from where they were to be set. In order to transport the forms to the wall site and fit them together, King placed a rigging harness on the forms and moved them by crane. For each form requiring installation, King coordinated with the crane operator as he walked beside the steel form and guided it down the hill. Once the form was at the wall site, he climbed the gang form and
30 lifted into place a 150 pound pole brace. As each form was added to the wall, King climbed the form, straddled the top of the form, and guided the crane carrying the next form. He used his hands and upper body to position the steel forms into place on top of the concrete slabs. He estimated that he carried approximately 220 pounds as he climbed the forms to attach the pole braces. This included not only the 150-pound poles but also an additional 70 to 75
35 pounds for his tool bags. Because King was also required to set the forms plumb and level, the installation of each form also required approximately 45 minutes to attach the braces. King testified that normally a crew of four to six workmen are assigned to such a process involving: (1) attaching the form to the crane, (2) transporting the form down the hill, (3)
40 setting the form on line, (4) attaching the braces to the form, (5) and adjusting the form to assure that it was plumb and level. He clarified that with a crew of four to six workmen; three workers would adjust the forms to be plumb and level, two workers would work on the wall, and a third person would work on the bottom making adjustments.

45 When King reached the point of adding the last form to the wall, he found it difficult to stabilize the form because of the wind. He found Curt Guida and asked for assistance. He estimated that Guida assisted him only for approximately 30 minutes. The completion of the

⁵ King testified that the date of his assignment was March 9, 2003.

wall took approximately a day and a half. When King had previously worked with a crew of four to six men, the same kind of wall was completed in approximately four hours. King testified that he had never before built such a wall by himself and he had never observed any other single employee installing such a form wall.

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King testified that from the date that he began to build the wall on March 10 until his employment ended on March 30, he principally worked by himself. Prior to that time, he had never been assigned to work alone. He testified that for the most part during this period, the only times that he worked with any other employees were during three concrete pours. He recalled one occasion when he was working with three other individuals on a wall pour for a wooden gang form system. Before Curt Guida left the work site, he told King that finishing the wall was his responsibility. Around 4 p.m., all of the other individuals left and he remained alone to finish the top of the concrete wall, align the wall, and to do whatever was necessary to insure that the bulkheads and the rebar were clear of concrete. King had never previously seen an employee left alone at the worksite.

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King testified that between March 10 and 30; he was assigned to build at least two sets of form walls by himself. On March 30, King's initial assignment was to strip walls and to clean forms. Guida began the day by giving King a "to do" list to complete as well. King explained that his assigned duties that day involved prying the forms away from the wall and taking the forms back up the hill to their original position. He was also expected to disassemble the scaffolding and remove the pole bracings. King estimated that it would normally take an entire day for one individual to disassemble the scaffolding for only one section of the wall. King was also assigned to remake all of the "she bolts" or wall ties. He estimated that it would have taken him approximately four hours to remove the 72 bolts from one of the wall sections. Normally, a whole crew of four to six people is assigned to this kind of bolt removal. King was also assigned to prepare the footings for the water stop, redo the water stop, remake bulkheads, make additional ties and scaffolding, and rebuild bulkheads. Guida's instruction was that King was to complete all of these tasks by the end of his 8-hour workday. While King attempted to complete these tasks, he finally stopped because of exhaustion and frustration. He grabbed his tools and walked to the construction trailer. He told Roger Guida that he had enough and that he was quitting. When he returned the following Monday to pick up his final check, he saw 8 people working on the same wall to which he had been assigned on the 30th.

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King testified that at the time that he quit on March 30, he did not have any other job lined up and didn't even know of any other job possibilities.

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Both Guida and Yocom testified that Yocom made the decision to reassign King. Both Guida and Yocom denied any knowledge of King's Union support. Yocom asserted that King's work after his reassignment was no different in desirability. He acknowledged however, that it was more difficult because he was building a higher wall than before.

F. Respondent's Photographing Pickets

Michael Jones is employed by Respondent as a cost engineer. He is the brother of

Respondent's owners; Ralph and John Jones and he has been with the company full time since 1985. Before that time, he worked summers in his youth. On April 5, Union Organizer Art Kessler set up a picket on the highway next to the entrance to Respondent's Springfield facility. He asked Hammons, who had previously been laid off, to participate in the picket as well. Hammons and Kessler displayed a banner stating that Respondent had committed unfair labor practices against the Union. After Kessler and Hammons had been at the picket site for approximately thirty minutes, Mike Jones arrived at the picket site and photographed their vehicles. Jones acknowledged that he photographed the picketers at Roger Guida's direction. He testified that Guida told him to photograph the signs and the license plates of the individuals picketing. Kessler, Hammons, and Jones all testified that he was present for only about five minutes as he photographed the license plates and the picket signs.

When Jones returned to the office, he discovered that the camera malfunctioned and he did not have any pictures. Jones returned to the picket site and wrote the wording of the picket signs and the license plate numbers on a piece of paper to give to Guida.

III. Factual and Legal Conclusions

A. Alleged 8(a)(1)

1. 8(a)(1) violations attributed to Dan Yocom

King alleges that in mid-October Yocom told him that if he saw Estenson with his camera, he should grab it and take it away from Estenson. King recalled that during the same conversation, Yocom announced that he was going to transfer Estenson to Barsness' crew where Barsness would keep him on ground level and "work him hard." King also testified that Yocom told him that he planned to contact the company attorney to see if he could get rid of Estenson because he knew that Estenson "was union." During the same day, Yocom also told King that he would be willing to pay someone to get into a fight with Estenson. Although the individual would have to be fired along with Estenson, Respondent could bring the individual back to work.

King and Reynolds testified that in late January, Yocom asked if they planned to attend an upcoming union meeting. Although King denied that he was going to the meeting, Yocom advised him that if he attended, he should park elsewhere to prevent his car from being seen "while they were driving by." The following week Yocom asked King if he attended the meeting or knew who had attended. When Reynolds returned to work on January 28 wearing union stickers on his hard hat, Yocom asked King if he knew how long Reynolds had been in the Union or if he had always been in the Union.

King also testified that during February, Yocom asked he and Haakenson if they knew who put union stickers on some of the equipment. During the same conversation, Yocom told them that Respondent suspected that Jason Hammons had been one of the employees responsible for doing so and that Respondent planned to get rid of Hammons. In talking about the Union, Yocom also added that it didn't matter if the union had a majority of support because Respondent "would never go union."

While Yocom denied all alleged 8(a)(1) violations, he acknowledged that he had never hired anyone he knew to be a union member. As discussed more fully below, I do not find Yocom’s overall testimony to be credible.

The record supports a finding that in mid-October, Yocom discussed what he planned to do to Estenson and how he ultimately planned to get rid of Estenson. He made it clear that his displeasure with Estenson stemmed not only from Estenson’s protected concerted activity, but also from his perceived Union affiliation. He also enlisted King’s assistance in confiscating Estenson’s camera and preventing Estenson from taking additional photographs of the job site. It is also apparent that when union activities continued after Estenson’s departure from the company, Yocom followed up with questions to King about his involvement in the Union and the involvement of other employees. In the course of interrogating King, Yocom also advised him that if he planned to attend the Union meeting, he should park somewhere else so that Yocom would not be able to see King’s car when he drove by the meeting place. In early February, Yocom asked King and Haakenson if they knew who was putting union stickers on equipment. He then volunteered that he believed that Hammons was one of the individuals doing so and he predicted that he would find a way to get rid of Hammons. Yocom also added that it didn’t matter if 60% of the employees voted for the Union because Respondent “would never go union.”

Based upon the credible record evidence, I find that Yocom told employees that employees would receive more onerous working conditions because they participated in union or other protected concerted activities in violation of Section 8(a)(1) and as alleged in Paragraph complaint section 5(a). See *Buckeye Electric Company*, 339 NLRB No. 42, slip op. at 1 (2003).

In determining whether interrogation of employees concerning protected concerted activity violates Section 8(a)(1) of the Act, the Board has considered whether under all of the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. *Westwood Health Care Center*, 330 NLRB No. 141, slip op. at 7 (2000). Based upon the totality of the circumstances, I find that Yocom’s interrogation concerning King’s union activity and that of others is further violative of the Act as alleged in complaint paragraph 5(d).

Yocom not only cautioned King about where he should park when attending a Union meeting, he also told King and Haakenson that he believed that Hammons was one of the “union guys” putting union stickers on the equipment. The Board does not require evidence that an employer actually engages in surveillance of an employee’s union activity. Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee’s union involvement. *Flexsteel Industries*, 311 NLRB 257, 257 (1993). *Emerson Electric Co.*, 287 NLRB 1065 (1988). I find that Yocom created the impression of surveillance among employees that their union or other protected concerted activities were under surveillance as alleged in complaint paragraph 5(f). Yocom’s statement that he was going to find a way to get rid of Hammons because he was considered to be one

of the “union guys” who had put Union stickers on the equipment is additionally violative of Section 8(a)(1) of the Act as alleged in complaint paragraph 5(j).

Prior to Estenson’s layoff, Yocom told King to steal Estenson’s camera and throw it away.⁶ Citing *Dillon Co.*, 340 NLRB No. 151 (2003), Counsel for the Union argues that it is unlawful to use violence against employees to restrain union activity. The Board has also found an employer’s confiscation of an employee’s notes pertaining to union activity to violate 8(a)(1) of the Act. *Purolator Products, Inc.*, 270 NLRB 694, 703 (1984), Crediting the testimony of King and Coons, I find Yocom’s solicitation of King to confiscate Estenson’s photographic record of his protected concerted activity to be equally as coercive of Section 8(a)(1) of the Act. Accordingly, I find merit to complaint paragraph 5(b).

In talking with King in early February, Yocom stated that it would not matter if 60% of the employees voted for a union, Respondent “would never go union.” While Yocom gave no additional information as to how the Respondent would resist, his statement nevertheless communicated the futility of supporting the Union. I find Yocom’s statement to constitute a violation of Section 8(a)(1) of the Act as alleged in complaint paragraph 5(k). See *Marshall Durbin Poultry Company*, 312 NLRB 110, 113 (1993).

2. 8(a)(1) violations attributed to Roger Guida

King testified that when he met with Guida in his office in February, Guida asked him if he knew who was responsible for putting union stickers on equipment. Guida also asked King if he had been contacted by the Union and if other employees had been contacted as well. Contrastly, Guida testified that King came to his office and voiced concerns that he was being harassed by the Union. Guida maintained that King told him that the Union was harassing him by telephoning him and by following him to his house. Guida also asserted that King asked him what he thought “could or should happen.” Guida testified that in response, he told King “he was going to have to search his own soul.” Based upon the record as a whole, I do not find Guida’s testimony to be credible. It is inconceivable that Guida would have taken such a nonchalant response to an employee’s report of this kind of harassment by the Union. In such circumstances, it would have been reasonable and far more credible to ask for additional information in order to help an employee complaining of such alleged harassment. Guida, however, denies any inquiries in response to King’s report. Based upon the overall record testimony, I find King’s testimony to be more credible with respect to this conversation. While it is not a *per se* violation of the Act for an employer to question an employee regarding his or her union membership, an interrogation which reasonably tends to restrain or interfere with an employee’s exercise of rights guaranteed by the Act is unlawful. *Rossmore House*, 269 NLRB 1176 (1984), enforced, 760 F.2d 1006 (9th Cir. 1985). In determining whether there has been such interference, the Board looks at the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunny Vale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Guida interrogated King in the administrative office with questions about his contacts and the contacts of other employees with the Union. Guida’s position as the project manager and the questions about

⁶ Both King and Coons testified concerning this statement.

the union stickers on the equipment, in conjunction with the questioning of King about Union contacts would reasonably tend to interfere with, constrain, or coerce an employee from exercising his rights. Accordingly, I find merit to complaint allegation 5(e).

When Guida told Reynolds that he was laid off, Reynolds begged to keep his job. Reynolds testified that Guida told him not to worry “there are union companies hiring right now.” Guida not only denied that he made such a statement to Reynolds; he denied that he had any conversation with Reynolds after he made the decision to terminate Reynolds. As discussed above, I do not find Guida’s testimony to be credible. Respondent does not dispute that Reynolds had a practice of absenteeism for his entire period of employment. This absenteeism was tolerated until Reynolds openly demonstrated his support for the Union. Within a week of this display, Guida directed Michael Jones to review Reynolds’ attendance record and he immediately terminated Reynolds’ employment. Crediting the testimony of Reynolds, I find that Guida’s statement constituted a violation of 8(a)(1) as alleged in complaint paragraph 5(i).⁷

3. The Supervisory Status in Dispute

General Counsel alleges that Dan Yocom and Roger Guida engaged in various conduct violative of Section 8(a)(1) of the Act. While Respondent denies that Yocom and Guida engaged in the conduct as alleged, Respondent admits that these individuals were supervisors and agents within the meaning Sections 2(11) and (13) of the Act. General Counsel also alleges that foremen Kim Barsness, Curt Guida, Mark Reimers, and Paul Johnson, as well as supervisor Michael Johnson, engaged in violative conduct. Respondent not only denies that these individuals engaged in the conduct as alleged, but Respondent also denies that these individuals are supervisors or agents within the meaning of Section 2(11) and (13) of the Act.

The Act specifically provides that a supervisor within the meaning of Section 2(11) of the Act means “any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C., Section 152 (11). The Supreme Court has also recently pointed out that employees are statutory supervisors if they “(1) hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer, *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S. Ct.

⁷ General Counsel also alleges that Guida’s comments to Haakenson in Guida’s office in early February constituted an invitation to resign and a threat to terminate him if he chose to engage in union activity. Haakenson’s recall of the conversation does not appear complete. Even Haakenson admitted that he did not fully understand Guida’s meaning. Guida’s statement that he should follow his heart as far as the Union is certainly not coercive or violative of the Act. I don’t find Guida’s comments in this alleged conversation to constitute a violation of 8(a)(1) as alleged in complaint paragraph 5(i).

1861 (2001). Thus, as stated in an earlier Board decision, this section of the Act is read in the disjunctive, giving supervisory status to an employee who possesses only one of the enumerated authorities. *Providence Hospital*, 320 NLRB 717, 725 (1996). In a recent case, the Board reiterated that it does not apply a burden-shifting standard in its analysis of whether employees are statutory supervisors under the Act. Rather, the burden of proving supervisor status rests on the party asserting that such status exists. *Dean & Deluca, Inc.*, 338 NLRB No. 159, slip op. at 2 (2003). See also *Freeman Decorating Company*, 330 NLRB 1143, 1143 (2000).

Counsel for the General Counsel also alleges that Barsness, Curt Guida, Mark Reimers, Paul Johnson, and Michael Jones are agents of Respondent. The Board applies common law principles when examining whether an individual is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. See *Great American Products*, 312 NLRB 962 (1993); *Southern Bag Corporation*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987).

Project Manager Guida testified that only Yocom, Grisvold, and he had authority to hire, fire, determine wages and benefits, reassign employees to different crews, conduct performance reviews, authorize raises, demote, promote, suspend, layoff, recall from layoff, and handle employee complaints. While Guida testified that foremen are not authorized to do any of these functions, he acknowledged that foremen are expected to handle day-to-day grievances and to direct employees in their work. Foremen Guida, Barsness, Johnson, and Reimers denied that they had the authority to hire, fire, determine wages and benefits, assign employees from one crew to another, authorize raises, promote, demote, suspend, institute an employee's probation, layoff, or recall employees. Curtis Guida also denied that he had the authority to prepare written warnings. While Barsness testified that he could handle employee complaints, Guida, Reimers, and Johnson denied that they could do so. Roger Guida acknowledged that the Information Manual given to all employees identified the foreman as being "in charge of a particular area of the project."

Employees Estenson, King, Hammons, Haakenson, and Reynolds testified that their foremen assigned their daily work. Reynolds, King, and Estenson also testified that foremen reassigned employees to other crew jobs during the day if needed. Estenson, Hammons, and King asserted that foremen authorize employees to work overtime. Estenson, Hammons, King, Haakenson, and Reynolds testified that foremen have authorized an employee leaving early without any further consultation or approval by any other manager. There is no dispute that foremen maintain employees' time cards.⁸ Reynolds testified that the foreman not only kept his time card but also kept a log as to whether he was late for work. Based upon Yocom's instructions, he completed his time card in pencil before the foreman initialed it. He recalled that his time sheet was often changed by the foreman to substitute a labor code other than what he had initially completed. Reynolds went on to explain that the labor code

⁸ Employees Estenson, Haakenson, Hammons, King, and Reynolds testified without contradiction.

determines the wage rate paid for the work performed. King recalled that he received discipline from Floyd Coons for tardiness. Both Estenson and King witnessed Coons' issuance of discipline to an employee. King recalled that both Coons and Paul Johnson recommended him for the raises he received.

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Floyd Coons testified that as a foreman he directed employees. He gave assignments to employees based upon the nature of the work, employees' skills, the schedule, and the superintendent's priorities. If there were changes in the work requirements, he could reassign employees on his crew without consulting with anyone else. Coons generally supervised 10 to 15 employees. Coons explained that when filling out an employee's time card, he included the daily hours, the labor code, and the cost code. Once the cards were signed by the employee and initialed by Coons, the cards were submitted to the office. When employees did not report to work and had not called in or were late for work, Coons documented the absence on their time card. Coons testified that if he checked with the office and found that an employee had not called in sick or with a reasonable excuse, he issued a reprimand and included his recommendation for discipline. Coons identified a May 29, 2003 reprimand that he issued to Bob King. The reprimand was issued for "No call & no show" and Coons' recommendation is shown as "No further action at this time. If this occurs again, could lead to suspension or possibly termination." The reprimand reflects that it was prepared and signed by Coons and approved by Yocom.

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Coons additionally identified a document that is entitled "John T. Jones Construction Co. Foreman's Daily Record of Work Progress." Coons confirmed that during his employment with Respondent, he completed the form each day. He recalled that when he arrived on the job in April 2003, Office Manager Grisvold gave him the form and told him that all foremen are required to complete the form each day. The form includes the date, the weather, the number and classifications of employees on the job, a description of the work completed, the names of employees who were absent or late, the activities of that day, the activities scheduled for the next day, comments made to and by an inspector, whether there were accidents, and whether there were materials, tools, or equipment needed. It is signed and dated by the foreman. General Counsel submitted into evidence a collection of forms that were completed by Coons between October 1, 2003 and December 12, 2003.

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Coons testified that if an employee requested time off for a "major deal," he would send them to Yocom. Generally however, if an employee told him that they needed to leave early to go for a doctors' or lawyers' appointment or what he termed as the "smaller stuff," he would approve their leaving without checking with Yocom. Coons kept a record of their leaving early on their time card. If employees came in late, he recorded their reporting time in his daily foreman's log. Coons designated employees to work overtime based upon the job and how many employees that he thought would be needed to do the work. Coons also testified that while he needed Yocom's authorization to administer discipline, he conducted the reprimand without requiring prior authorization. Coons instructed employees in their work and fielded approximately 90 percent of the employees' complaints and concerns. Coons testified that he has effectively recommended employees for promotions and wage

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increases.⁹ Coons ordered the necessary materials and equipment for the work, as crewmembers are not allowed to do so.

4. The Issue of Coons' Credibility

In his brief, Counsel for Respondent argues that General Counsel will undoubtedly rely heavily upon the testimony of Coons. Respondent argues that Coons is convinced that Respondent held him responsible for the form blowout of October 10, and wrongfully terminated him from his position as foreman at the Springfield project. Respondent asserts that Coons is desperate for "payback" and the unfair labor practice trial "gave him the perfect opportunity to exact revenge." Respondent contends that Coons' testimony should not be credited for this reason.

Yocom testified that approximately a week after Coons was laid off, he spoke with Coons. Yocom did not recall at that time that Coons voiced any complaints about his layoff or that he claimed any unfairness in his layoff. Yocom recalled that approximately a month to six weeks later, Coons called him while he was with John Grisvold at a local restaurant/bar. Yocom testified that Coons was upset about his layoff and threatened Yocom that he would "break his legs" or "something to that effect." Approximately two hours after Yocom returned to his apartment, Coons came to his apartment door. Yocom described Coons as loud and obnoxious and demanding to know why he had been laid off. Yocom recalled that his face was bleeding and he did not appear sober. Yocom acknowledged that he had also drunk a few beers at the restaurant. When asked what his own condition had been, he replied: "Probably not that sober. I was soberer than he was." Yocom suggested to Coons that they go downstairs to talk. Roger Guida was also present in Yocom's apartment at the time of Coons visit. Yocom denied that he had plans to fight, Yocom testified: "Then it is kind of a blur. Push got to shove. And we got in kind of a fight." Yocom admitted that he could not recall who had pushed whom first. He recalled that after they pushed each other around, he found himself on the pavement and Coons' wife was choking him around the neck. John Grisvold, who had been visiting with his brother Mark Grisvold in the same apartment complex, came out to the parking lot and began wrestling with Coons.

John Grisvold recalled that the incident at the apartment occurred around January 13, 2004, when he was visiting with his brother, Mark Grisvold and his wife Sherry. Grisvold first saw Coons when Coons and his wife came to the Grisvold door, asking for directions to Yocom's apartment. Grisvold recalled that they both appeared to be drinking. Even though he gave them directions, they returned a second time to ask for the apartment number. When Grisvold saw them the second time, Coons' face was bleeding and "scuffed up." From the open apartment door, Grisvold heard Coons yelling at Yocom and also yelling about Roger Guida. Grisvold surmised that Yocom took Coons to the parking lot to keep Guida from hearing what Coons was saying about him. When Grisvold looked down toward the parking lot from his brothers' balcony, he saw Yocom, Coons, and Coons' wife talking and smoking. After Grisvold returned to the interior of the apartment, he then later heard yelling and screaming. When he returned to the balcony, he saw all three of them on the ground. He

⁹ He recalled specifically recommendations made for Jim Michaels, Bob King and Dan Frye.

jumped over the balcony railing and ran to the parking lot. Grisvold recalled that Coons bite him on the arm, when he tried to pull Coons away from Yocom. Grisvold recalled that he had to push Coons' wife away as she was choking him and that finally Coons' son appeared and hit him twice in the face. Grisvold declined to fight any further with Coons' son and finally the police were called to the scene.

Coons acknowledged that he was not happy that Respondent laid him off a week before Christmas. While Coons denied that he threatened Yocom, he admitted that he went to Yocom's apartment to talk with him and that he was drunk at the time. He recalled that Yocom refused to talk with him over the phone and told him to come to his apartment to talk with him. He admitted that he may have sworn at Yocom but denied that he physically assaulted him. Coons further admitted that he was angry and that he may have called Yocom a "name or two." Coons explained that he went there to ask Yocom why he didn't take responsibility for using the welded ties on October 10 rather than blaming him (Coons) for what happened on the blowout. Coons contended that when he told Yocom that he was a "chicken shit," Yocom punched him in the head and as Coons stepped back, he fell, breaking his ankle. Coons recalled that after he fell to the ground, Yocom continued to hit him in the face three or four more times. At that point, Coons' wife jumped on Yocom and grabbed him in a chokehold.

Certainly, the record is replete with evidence to support that Coons was dissatisfied with Yocom for his December 2003 layoff. Based upon his testimony, it appears that he may well have felt that he was sacrificed for his failure to align himself with Respondent concerning either the October blowout or the related employee complaints. Despite his obvious dissatisfaction with Respondent however, I found Coons to be a credible witness. Called as a witness for General Counsel, Coons credibly testified that prior to testifying, he had neither spoken with anyone from the Board nor had he provided an affidavit or written statement to the Board. In essence, he was a witness who had not been prepared by any party and his testimony was spontaneous. While it was apparent that he strongly believed that the October blowout was caused by the use of welded ties, his testimony was otherwise straightforward without any obvious attempt to present Respondent in the worst possible light. His testimony appeared to be candid and based upon an accurate recall of the events while he served as foreman. Accordingly, I credit Coons' testimony, including his testimony concerning the extent of his supervisory authority.

In its 2000 decision, the Board affirmed an administrative law judge's finding that two electrical foremen were supervisors within the meaning of the Act. *PNEU Electric*, 332 NLRB 616, (2000), enforced in relevant part by 309 F.3d 843 (5th Cir. 2002). There was no dispute that the individuals in question could not hire, fire, or suspend employees. There was evidence, however, that the individuals kept time for employees and assigned and checked on the work of the crew. There was one instance in which one of the foremen verbally reprimanded an employee for failing to get to work on time. The administrative law judge concluded that the foremen responsibly assigned and directed the work of the crews assigned to them and exercised discretion, independent judgment, and authority. The judge also found that even if the foremen were not statutory supervisors, they acted as the employer's agents. Specifically, the judge found not only that the employer held these individuals out as

supervisors, but also “the antiunion statements attributed to them echoed (and amplified) the sentiments” of the admitted supervisor. The judge concluded that the employees could reasonably believe that, in speaking about and against their organizational efforts, these foremen were reflecting company policy and were speaking for the respondent’s management.

In determining whether statements made by individuals to employees are attributable to the employer, the Board has looked to whether under all of the circumstances, the employees would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management. *Zimmerman Plumbing Co.*, 325 NLRB 106, 106 (1997). In *Zimmerman*, the Board considered that the foremen in issue acted as the conduits for relaying and enforcing the respondent’s decisions, policies, and reviews. The foremen attended the monthly management meetings and were privy to the respondent’s policies and objectives. Accordingly, it was reasonable for the rank-and-file employees to believe that the foremen were reflecting company policy and acting for management when they engaged in the conduct found to be unlawful. In essence, the standard for establishing agency for the purpose of Section 2(13) of the Act is whether the individual had been placed in such a position by management that employees could reasonably believe that the individual spoke for management. *Lemay Caring Center*, 280 NLRB 60, 66 (1986). It is also irrelevant whether Respondent’s management directed the supervisors and/or agents to make statements violative of Section 8(a)(1) because such unlawful conduct would be attributable to Respondent in any event without regard to whether it was pursuant to a specific direction. *Limestone Apparel Corporation*, 255 NLRB 722, 733 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

Based upon the total record evidence including the credited testimony of Coons, I find that Barsness, Johnson, Reimers, and Curt Guida were in positions such that employees could reasonably believe that they were speaking for Respondent and acting as agents of Respondent within the meaning of 29 U.S.C. Section 152 (3). *Delta Mechanical Inc.*, 323 NLRB 76, 78 (1997); *United States Service Industries, Inc.*, 319 NLRB 231, fn. 2 (1995).

5. 8(a)(1) Allegations Attributed to Barsness

Both King and Haakenson testified that they found it unusual that Barsness assigned Estenson to do laborers’ work rather than carpenter’s work. When King asked Barsness in mid-October why he was wasting Estenson by having him perform laborers’ work, Barsness replied that Yocom told him to put Estenson on every “shit job there was out there.” In a separate conversation, Haakenson also asked Barsness why Estenson was performing the work that he was; Barsness replied that the “office” told him to put Estenson on the worst jobs. Barsness denied making such statements to either King or Haakenson. Barsness also confirmed that for the past three years, he has worked for approximately six to seven months each year for Respondent. He acknowledged that he normally does not complete applications for employment each year and simply waits for Respondent to call him back to work when he is needed. At the time of the trial, Barsness was not employed and he did not deny that he had an expectation to be recalled by Respondent. Based upon the overall testimony, and considering the fact that at the time of the trial, Barsness was awaiting recall by Respondent, I

find King and Haakenson’s testimony to be more credible. Accordingly, I find that in mid-October, Barsness not only told employees that they would receive more onerous working conditions because they participated in union and other protected concerted activities, but also gave employees the impression that Estenson was punished because of his union and/or other protected concerted activities. Accordingly, I find merit to complaint paragraph sections 5(a) and (c).

6. 8(a)(1) Allegations Attributed to Curt Guida

Reynolds testified that on January 28 and the first workday after he met with Union Organizer Kessler, he wore union stickers on the front and back of his hard hat. He also volunteered to Foreman Johnson that he had met with the Union organizer as well as the OSHA investigator. He testified that when he approached Curt Guida to ask about his next work assignment, Guida looked at him and spit into his face without saying a word to Reynolds or responding to Reynolds’ question. Guida not only denied that he spit at Reynolds; he also denied that he saw Reynolds with any union stickers on his hat. Guida further denied that he ever saw Reynolds or any other employee engaging in Union activity. While there are no witnesses to corroborate either Reynolds or Guida, I find Reynolds to be the more credible witness as discussed more fully below. Guida has been with Respondent for 23 years and has been a superintendent on various projects since 1997. His alleged unawareness of any union activity lacks credibility in light of the credited testimony demonstrating that employees were displaying union paraphernalia and placing union stickers on equipment. Accordingly, crediting Reynolds’ testimony, I find merit to complaint paragraph 5(g).

7. 8(a)(1) Allegations Attributed to Reimers

Threatening employees with termination for becoming involved in union activity is a violation of Section 8(a)(1) of the Act. *Viele & Sons, Inc.*, 227 NLRB 1940 (1977). King testified that during the time that Reynolds wore union stickers on his hard hat, he had occasion to talk with Reimers near the tool trailer. During the conversation, Reimers remarked “rumor has it that your boy’s gonna get fired” and then mentioned Reynolds by name. Reimers denied this statement to King. As discussed more fully below, I find Reimers’ denial lacking in credibility. Inasmuch as the record supports a finding that Reimers’ made this statement, I find merit to complaint paragraph 5(h).

8. 8(a)(1) Allegations Attributed to Johnson

King testified that while working with Johnson in late February, Johnson asked King what he thought about the Union. King recalled that he confirmed to Johnson that he was a supporter of the Union. Later during the first week of March, Johnson took King to a local bar to play pool. While there, Johnson asked King if he were a Union cardholder. When King denied that he was a cardholder, Johnson continued to discuss the Union and asked King why he thought that the Union wanted to be involved with Respondent. During this conversation, he told King that he (Johnson) had heard from other employees that King “was Union.” In response to questions posed by Respondent’s counsel, Johnson responded simply

with “No” when asked whether he engaged in the various conduct alleged in complaint paragraphs (l) and (m). When asked if he had ever asked King what he thought about the union, Johnson replied “Not specifically, no.” Johnson neither denied nor confirmed the alleged conversation with King at Nighttimes Bar. I find Johnson’s terse denial of the complaint allegation lacking in credibility when compared with King’s more extensive description of their conversations. Based upon the total record evidence, I find that Johnson unlawfully created the impression that King’s union activities were under surveillance. See *Fred’k Wallace & Son*, 331 NLRB 914, 914 (2000).

While King’s testimony reflects that Johnson’s interrogation took place in a neutral and even friendly surrounding, I do not find it any less coercive. Admittedly, Johnson’s interrogation did not involve any associated threats and took place in the context of a friendly conversation. The Board has found however, that an interrogation by a friendly supervisor may have a far more coercive impact than an interrogation by a hostile agent of management. *Mayfield’s Dairy Farms, Inc.*, 225 NLRB 1017, 1019 (1976). Accordingly, I find merit to complaint paragraphs 5(l) and (m).

9. 8(a)(1) Attributed to Michael Jones

There is no dispute that Jones attempted to photograph not only the picket signs but also the vehicles driven by Kessler and Hammonds. When the camera malfunctioned, Jones was forced to return to the site of the picket and make a written record of the picket sign verbiage. Roger Guida testified that he directed Jones to take pictures of the signs and to record the license plate numbers of the picketers. He asserted that he needed to know the verbiage of the picket signs in order to assess whether the picket would affect his union subcontractors. Additionally, Guida also claimed that because there had been previous thefts at the job site, he needed a photograph of the picketers. There is no dispute that during the picket, neither Kessler nor Hammons went onto the property controlled by Respondent or that they engaged in any unlawful activity or violence.

While Respondent denies Jones’ agency and/or supervisory status, there is no dispute that he attempted to photograph Hammons and Kessler at the direction of Roger Guida.¹⁰ When thwarted in his attempts to photograph the picketers, Jones openly took notes to record the information requested by Guida. I find that Jones’ actions constituted unlawful surveillance in violation of Section 8(a)(1). *Sage Professional Painting Company*, 338 NLRB No. 162, slip op. at 3 (2003). Inasmuch as there was no evidence that either Hammons or Kessler entered Respondent’s property or were in any way connected to any previous thefts, Respondent demonstrated no proper justification for the surveillance as alleged. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). Accordingly, I find merit to complaint paragraph 5(n).

¹⁰ The tape-recorded comments of Jones reflect that he told Hammons that he was just doing his job as directed.

10. Summary Concerning Credibility

In summary, General Counsel alleges that during a period between mid-October 2003 and April 5, 2004, Respondent, through various supervisors and agents, engaged in conduct that was violative of Section 8(a)(1) of the Act. Specifically, General Counsel alleges that Respondent engaged in this conduct through the statements and actions of Roger Guida, Yocom, Johnson, Barsness, Curtis Guida, Reimers, and Jones. As explained above, I find each of these individuals as supervisors or agents within the meaning of Section 2(11) and or 2(13) of the Act. With the exception of Jones, each of these individuals denies the conduct or statements attributed to them by General Counsel's witnesses. There is no dispute that Jones not only attempted to photograph the pickets on April 4, he prepared a written record of the wording on the signs as well as the license plate numbers for both Kessler and Hammons. Accordingly, there is no dispute concerning the actions taken; only a dispute with respect to whether such conduct is violative of the Act.

Respondent witnesses' Roger Guida, Yocom, Curtis Guida, Barsness, Johnson, and Reimers all denied they engaged in any of the conduct or statements as alleged. In response to questions by counsel for Respondent, each witness gave a rote denial to not only the alleged conduct but to any potentially related conduct. Their testimony was consistent with little contradiction. I nevertheless find their overall testimony unimpressive and lacking in candor and credibility. The majority of the 8(a)(1) allegations involve Superintendent Yocom. His answers to both direct and cross examination questions were primarily monosyllabic and his overall responses were somewhat brusque. In contrast, General Counsel witnesses King and Hammons were more forthcoming in their testimony and provided more detail without apparent exaggeration or self-serving embellishment.

While Roger Guida was more extensive in his testimony than Yocom, his overall testimony appears to lack sincerity. In April 2000, Millwright Local Union #1463 petitioned the Board to represent Respondent's employees working in Douglas County, Nebraska. The Decision and Direction of Election reflects that at that time Roger Guida was Vice President and reported directly to President John B. Jones and CEO Jeff T. Jones. Guida acknowledged that unfair labor practice charges were filed against Respondent during this same organizing period. The fact that Guida has been employed with the company for approximately 35 years and was Respondent's Vice-President at the time that prior unfair labor practice charges were filed in 2000 does not provide a sufficient basis in and of itself to substantiate the current complaint allegations. Guida's background however, substantiates his prior involvement in union organizing campaigns and indicates that he would have a working knowledge of the organizing procedure. As was true of Yocom, Guida denied completely any knowledge that King, Hammons, Reynolds, or Estenson were involved with union organizing. Guida admitted having only one conversation with an employee concerning the Union. He testified that this conversation occurred in his trailer with only he and Bob King present. He could not recall the date of the conversation. He testified that King initiated the conversation and reported that he was being harassed by the Union. According to Guida, King contended that the Union was harassing him by following him to his house and through telephone calls. Guida testified that he told King to "search his soul" and that he could shut the door or hang up if he didn't want to talk with people. A summary of Respondent's payroll records reflects

that between October 4, 2003 and March 6, 2004, Respondent employed no fewer than 29 and no more than 48 employees. If Guida’s account is credited, he was put on notice that the Union was present and actively organizing among an average workforce of 38 employees. It is inconceivable that Guida simply told King to “search his soul” and then did nothing to investigate the extent of the Union’s organizing or to attempt to defeat the organizing effort. I find Guida’s overall testimony and his specific denials lacking in credibility.

As with Roger Guida, Curt Guida has experience in prior union organizing campaigns. At the time of the Millwrights organizing efforts in Nebraska in 2000, Curt Guida was working as Respondent’s job superintendent. Guida denied that he spit into Reynolds face and denies any knowledge of Reynolds Union activity. In contrast, Reynolds testified that his encounter with Guida occurred on the first day that he wore visible union stickers on the front and back of his hard hat. He asserts that when Guida saw him, he spit into Reynolds’ face. Overall, I found Reynolds’ testimony to be without contradiction and straightforward. His recall does not appear impaired and I find him to be a more credible witness than Guida.

The remaining 8(a)(1) allegations involving verbal statements are attributed to Barsness, Reimers, and Johnson. I note for the record that Johnson was not only employed by Respondent at the time of the 2000 Millwright organizing, he also functioned as a general foreman. As with Curt Guida, the parties in the prior case stipulated that Johnson was a statutory supervisor. While there were no observable flaws in the testimony given by Barsness, Johnson, and Reimers, I find their overall testimony less credible than King, Haakenson, Reynolds, and Hammons. Based upon the total record testimony, I found King, Haakenson, Reynolds, and Hammons as credible witnesses. They did not appear to exaggerate or embellish their testimony. Finding their testimony to be totally trustworthy, I find the contradicting testimony of Barsness, Reimers, and Johnson lacking in credibility.

B. 8(a)(3) Allegations

In determining whether an employer’s actions against an employee violates Section 8(a)(3) of the Act, the Board uses the analytical framework set out in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). *Wright Line* is premised on the legal principle that an employer’s unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. *American Gardens Management Co.*, 338 NLRB No. 76 slip op. at 2 (2002). Based upon the *Wright Line* analysis, the burden rests with the General Counsel to make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the respondent’s decision to take the adverse action in issue. Under the *Wright Line* framework, the General Counsel must demonstrate the following: (1) the employee engaged in protected activity, (2) the employer knew about the employee’s protected activity, (3) the employee suffered an adverse employment action, and (4) the employee’s protected activity was a motivating factor in the employer’s decision to take action against him.

Once unlawful motivation is shown, the burden of persuasion shift to the respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even the absence of the protected activity. *Wright Line* above at 1089. Under *Wright*

Line, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct. *Five Cap, Inc.*, 331 NLRB 1165, slip op. at 9 (2000); *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991).

1. Whether Respondent Discriminatorily Laid off Brian Estenson

Respondent argues that when Guida and Yocom made the decision to layoff Estenson, they were unaware of any union or protected activity and thus could not have based their decision on such considerations. I find that the record fully supports that not only were Guida and Yocom aware of Estenson’s union and protected concerted activity, but his layoff was triggered by that knowledge.

Both Yocom and Guida deny any knowledge that Estenson engaged in protected or union activity prior to his layoff on October 31, 2003. Specifically, Yocom and Guida denied any knowledge that Estenson complained about safety, took photographs, or was involved in any way with OSHA. Coons, King, and Reynolds all recalled Estenson’s raising concerns about safety procedures in the safety meeting. Foreman Coons specifically recalled talking with Yocom about Estenson’s photographing the worksite during the week following the blowout. He recalled their speculating as to whether Estenson planned to use it for a resume or to record unsafe acts. Coons recalled that Yocom told him to take Estenson off the crew and put him in an area where he didn’t have to tie-off. Yocom added that he planned to layoff Estenson because he didn’t want anyone on the crew who was taking pictures to send to OSHA. King credibly testified that Yocom told him to grab Estenson’s camera if he saw it. Coons recalled that Yocom volunteered that someone should take Estenson’s camera and break it. Yocom added that it would not bother him if “someone kicked the shit out of Brian Estenson.”

King testified that Yocom talked with him about how he could get rid of Estenson and his plan to talk with the company attorney to see how Respondent could do so legally. King recalled that Yocom identified Estenson as “union.” Coons testified that he had always been a non-union carpenter and he and Yocom discussed who they thought were union supporters. Coons recalled that Estenson was discussed as a possible union supporter. Yocom also told Coons that the OSHA inspector “fingered” Estenson as the employee who had filed an OSHA complaint. After Estenson was transferred to Barsness’ crew, both Haakenson and Hammonds questioned why Estenson was assigned to laborers’ work rather than carpentry. In response to Hammonds’ question, Barsness explained that Yocom had instructed him to put Estenson on “every shit job there was out there.” In response to Haakenson, Barsness acknowledged that he was doing so because “the office” told him that Estenson was to have only the worst jobs and he was not to have any work above ground level because of his photographing.

In its decisions in *Meyers Industries* 168 NLRB 493 (1984) and *Meyers Industries*, 181 NLRB 882 (1986), the Board established the requisite elements in an 8(a)(1)

discrimination allegation. General Counsel must provide the following: (1) the employee's actions were concerted, (2) the employer knew of the concerted nature of the employee's actions, (3) the concerted activity was protected by the Act, and (4) the adverse employment action was motivated by the employee's protected concerted activity. In determining the existence of concerted activity, the Board has considered such factors as whether the comments involved a common concern regarding conditions of employment and whether the issue was framed as a common concern. See *Air Contact Transport, Inc.*, 340 NLRB No. 81, slip op. at 12 (2003). In this case, General Counsel has successfully established that Estenson repeatedly engaged in protected concerted activity. He raised concerns about safety to management in individual conversations and in management-conducted safety meetings. He not only photographed unsafe working conditions, he filed a charge with OSHA. Credited testimony reflects that Respondent was well aware of Estenson's protected concerted actions. Counsel for the General Counsel's argument that Estenson was transferred only hours after he again raised concerns in the October 15 safety meeting has merit.

Respondent asserts that safety is a high priority as evidenced by its retaining a safety consulting firm to assist with OSHA compliance. As Counsel for the General Counsel points out, Respondent's alleged respect for compliance with OSHA regulations is diminished by its autumn 2003 newsletter. In the publication identified as "The Communicator" OSHA is defined as "a protective coating made by half-baking a mixture of fine print, red tape, split hairs, and baloney – usually applied at random with a shotgun." Crediting the testimony of Coons, King, and Reynolds, I find that the evidence supports that Respondent was fully aware that Estenson not only complained about safety concerns on the job but also took photographs of what he believed to be unsafe conditions. Additionally crediting Coons, I find that Respondent believed Estenson to be responsible for the OSHA complaint. The evidence reflects that Estenson repeatedly raised safety concerns to management, photographed unsafe working conditions, and filed a complaint with OSHA. Despite Guida and Yocom's denials, the credited evidence reflects that management was fully aware of these actions and he was reassigned and laid off because of such protected activity. The Board has long found that an employer violates Section 8(a)(1) of the Act by laying off employees because of such protected concerted activity. See *Twistex, Inc.*, 283 NLRB 660, 666 (1987). Accordingly, General Counsel has established a *prima facie* case that Estenson was not only transferred and assigned more onerous work, but also laid off because of protected concerted activity as well as his union activity.

Under the Board's ruling in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, (1980), 662 F.2d 89 (1st Cir. 1981), cert denied, 344 U.S. 989 (1982), and approved by the Supreme Court in *NLRB v. Transportation Management Services, Inc.*, 462 U.S. 393 (1983), the General Counsel bears the initial burden to establish a *prima facie* showing of discriminatory discharge. After such a showing, the burden shifts to the respondent to show that it would have taken the adverse action without consideration of the employee's protected activity. *American Gardens Management Co.*, 338 NLRB No. 76, slip op at 2 (2002).

Respondent maintains that Yocom's desire to keep Estenson "on the ground" was merely an understanding of Estenson's discomfort with working at heights and it was an accommodation of his preferences rather than discrimination toward him. Respondent further

argues that Estenson was laid off as a part of a legitimate crew reduction. Specifically, it is argued that after the October 10 concrete spill, Respondent found itself with an excess of carpenters. Respondent submits that at the time of Estenson’s layoff, there was no additional work for him to perform.

The record evidence does not support Respondent’s assertion. Yocom testified that once he hires a crew, he does not necessarily hire them to perform a specific job on a specific jobsite. He acknowledged that he hires them with the expectation that he will continue to keep them employed as long as there is work they are capable of doing. He further acknowledged that he does not layoff employees and then hire new employees to do the work if he already has employees who are capable of performing the work.

Respondent asserts that Estenson was transferred to Barsness’ crew and then laid off two weeks later because there was not work available for him. This assertion however, is contradicted by the fact that four days after Estenson was transferred out of Coons’ crew, Respondent hired carpenter Ricky Johnson and assigned him to Coons’ crew. Coons testified that Johnson came in as a replacement for Estenson. Coons also credibly testified that at the time of Estenson’s layoff, there was still a need for carpenters on his crew and he was unaware of any reduction in force underway. Coons’ testimony is further supported by the fact that the number of employees on the job increased rather than decreased after Estenson’s layoff. The payroll records indicate that there were 45 employees on the payroll period ending date of October 25 and 46 employees on the payroll period ending date of November 1.

Respondent also contends that two other employees were released from employment on or about the same time as Estenson. While Richard Vandenburg was terminated on October 30, the separation notice reflects that he was fired for cause because of absenteeism. The personnel form also indicates that Respondent would re-hire him in the future. Eric Jenkins, a laborer was laid off on October 31 as a “reduction in crew.” His notice of separation also indicates that he would be re-hired in the future. While Estenson’s notice of separation indicates that he was laid off because of a reduction in crew, Yocom indicated that he would not be re-hired in the future. In explaining why he did so, he replied: “I didn’t have anywhere else to put him. And he was sort of hard to work with.” I find Yocom’s rationale totally lacking in credibility. Despite his assertion that Estenson was difficult to work with, there was no evidence that Estenson had ever been disciplined or even counseled concerning this alleged problem. While he asserted that Estenson had a “personality conflict” with other employees, there was no evidence offered in support of this contention.

Respondent asserts that its legitimate reduction in crew is evidenced by Barsness’ layoff on November 20. Respondent contends that it did not reconstitute Barsness’ crew or hire additional carpenters after Barsness’ layoff. I do not find merit in Respondent’s argument. For the past three years, Barsness routinely left his job in November and returned the following April. He testified that he does not always submit an application with Respondent each time that he returns, but simply waits for Respondent to call him when there is work for him. Coons testified that Barsness returned to his home in North Dakota prior to Thanksgiving to begin a part-time business that he had there. Coons disputed the layoff,

explaining that it was well known on the job site that Barsness quit. I also note that as of the time of Barsness' alleged layoff, Respondent had already rehired or transferred core employee Mark Reimers to the jobsite as a foreman on October 19.

5 Vandenburg and Jenkins were separated from employment on or about the same time
as Estenson. Barsness was allegedly laid off approximately 20 days later. As discussed
above, Respondent had already transferred a new foreman to the jobsite at the time that
10 Barsness left his employment in November and Barsness' leaving was consistent with his
practice of three years. Respondent argues that Estenson was laid off on October 30 because
there was no work for him. I note however, that Vandenburg was fired only the day before.
Accordingly, this sequence begs the question as to why Estenson was not retained to finish
the work performed by Vandenburg. The fact that Respondent also laid off Jenkins does not
15 substantiate that Estenson would have been laid off regardless of his protected activity. Based
upon all of the credited record evidence, it is apparent that the reasons given for Estenson's
layoff were pretextual. The fact that Jenkins was conveniently laid off on the same day is
merely an extension of that pretext.

20 Under all of the circumstances and as discussed above, I find that Respondent has not
satisfied its *Wright Line* evidentiary burden. The record supports a finding that Respondent's
proffered reason for Estenson's layoff is pretextual, and that the real reason for his layoff was
in retaliation for his protected concerted activity and union activity. His transfer to Barsness'
25 crew¹¹ and the assignment of more onerous work prior to his layoff was simply a predicate to
the planned layoff and was also unlawfully motivated. Accordingly, I find that Respondent
violated Section 8(a)(1) and (3) of the Act in the conduct toward Estenson as described above.

2. Whether Respondent Discriminatorily Laid Off Hammons

30 Sterling Jason Hammons began working for Respondent in May 2003. While he had
been a member of the Union for 20 years, he did not display any support for the Union until
February 13, 2004. On that day, Hammons not only placed union bumper stickers on his
truck, he also came to work wearing a vest with unions stickers on the front and back. The
35 stickers were 4 inches and 10 inches in diameter and located above his face on his hat, on the

11 In Respondent's post-brief motion to supplement the record, Counsel for Respondent argues that these
time cards are relevant to show that after the October 10 blowout, Respondent also reassigned Bob
Dodge, Bob Cooke, Ryan Reynolds, and Shawn Robinson to work on other structures. Respondent
40 asserts that these reassignments demonstrate that Estenson was not singled out for reassignment.
Although I have granted Respondent's motion, the additional proof does not alter my overall findings.
Because of the severity of the blowout, it is certainly reasonable that Estenson's crew could not
continue the same work that was planned before October 10. The fact that some of the crew members
may have been assigned to work on different structures does not diminish the record evidence that
45 Estenson was moved to an entirely different crew and then laid off on the pretext of no available work.
Respondent's additional proof would also demonstrate that while these other employees may have been
assigned to new jobs after the blowout, they were not laid off with Estenson for lack of work.
Additionally, while King and Reynolds were included in this group of four employees, the record also
reflects that neither King nor Reynolds had engaged in any demonstrable union activity at that time. By
contrast, Estenson, who had engaged in protected concerted activity and who was a suspected union
supporter, was transferred away from the crew and laid off two weeks later.

right side of his chest, and on his back. During the previous month, Hammons invited employees to a Union meeting where he distributed Union authorization cards and Union materials. Hammons testified that when he wore his Union vest to work on February 13, he saw Guida, Yocom, and Reimers and later that same day he was placed on layoff.

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General Counsel presented testimonial evidence to show that Respondent was aware of Hammons' Union activity as early as January 2004. Reynolds recalled that at the end of January 2004, Reimers told him of Yocom's prediction that because Hammons was a "slow, typical union guy," he would be gone soon enough. In early February, Yocom told King and Haakenson he knew Hammons and Jim Michaels were "union guys" and that Yocom thought that they were the individuals responsible for putting Union stickers on equipment. Yocom also added that Respondent was planning to find a legal way to get rid of Hammons. Yocom told Coons that he thought that Hammons and Michaels were "union moles." While Barsness denied that he saw Hammons engaging in any union activity, he acknowledged that he had heard Hammons talking about having been in the Union.

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Crediting the testimony of Hammons, King, and Coons, it appears that Hammons' affiliation with the Union was first known or at least suspected in January 2004. When he appeared at work on February 13 wearing Union stickers, he removed any previous doubt of his support for the Union. Within hours of his doing so, he was laid off.

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Respondent denies any knowledge of Hammons' union activity and asserts that Hammons was laid off because there was no other work to which he could be assigned. Respondent also argues that there was nothing discriminatory in the decision to layoff Hammons because Ricky Johnson and Anthony Redus were laid off on the same day as Hammons.

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Despite Respondent's assertions, General Counsel presented credible evidence that there was continuing work available for Hammons. At the beginning of the day when he was laid off, Reimers assigned Hammons and the rest of the crew a week's worth of work to be completed the following week while Reimers was out of town. Reimers also told them that when he returned they would install sidewalks or a similar amenity. Hammons also recalled that only three months before, Barsness told him that there was a year's work remaining on the job. Hammons testified that at the time of his layoff, there were still pours on the inside of the tank that need to be completed, and the northern structure required building. When Hammons returned to the jobsite on the Monday following his layoff, he saw carpenters still working. Some were, in fact, finishing the job that he had been doing the previous week.

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When an employer's proffered basis for its actions is determined to be pretextual, it may be inferred that there is not only another motive, but in fact, an unlawful motive that the employer desires to conceal. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996). Additionally, the Board has found that a finding of pretext defeats any attempt by a respondent to show that it would have taken the same action against the discriminatee absent his union activity. *Syracuse Scenery & Stage Lighting Co., Inc.*, 342 NLRB No. 65, slip op. at 8 (2004). Specifically, it has been found where "the evidence establishes that the reasons given for the Respondent's action are pretextual - - that is, either false or not in fact relied

upon - - the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB No. 56, slip op. at 5 (2003). Based upon the total record evidence, I find that Respondent’s reason for Hammons’ layoff is pretextual and that he would not have been laid off in the absence of his demonstrated union activity. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it laid off Hammons on February 13.

3. Whether Respondent Unlawfully Discharged Ryan Reynolds

Ryan Reynolds worked for Respondent from June 2003 until his discharge in February 2004. His first union activity was his meeting with Union Representative Art Kessler on January 26, 2004. Kessler gave him Union stickers that he wore on his hardhat when he returned to work on Wednesday, January 28. While wearing the hat, he spoke with foreman Paul Johnson and told him that he had met with the Union and with OSHA on January 26. On the same day and while still wearing the Union stickers, he encountered Curt Guida. Standing only three feet away, Guida looked directly at Reynolds and spit in his face. On this very same day, Yocom asked King how long Reynolds had been Union. King testified that when Reynolds first wore the Union stickers on his hat, foreman Reimers told him “rumor has it your boy’s gonna get fired.” King knew that he was talking about Reynolds because Reimers specifically mentioned his name.

Reynolds testified that the following week, he called in to report that he would not be at work that day because of a dental appointment. Reynolds testified that Roger Guida told him that he need not come in because there was no work for him. Reynolds recalled that Guida added, “Not to worry, there are union companies hiring right now.”

Respondent contends that during the week of January 26 through 30, Reynolds was absent on Monday, Tuesday, and Friday. Roger Guida testified that he asked Mike Jones to review the attendance logs and report on Reynolds’ attendance history. Respondent contends that Jones reported that Reynolds had a history of “excessive absenteeism.” Guida testified that he made the decision to terminate Reynolds that same day. Guida also contends that while he planned to communicate that decision to Reynolds when he returned to work, Reynolds never returned. Guida denies having any telephone conversation with Reynolds as Reynolds alleged.

Based upon the total evidence, I find that General Counsel has established a *prima facie* case that Reynolds was terminated because of his demonstrated support for the Union. While he had not previously shown any support for the Union, he openly and blatantly demonstrated his Union sympathies on January 28. Not only did he wear the Union stickers on his hat, he also admitted to foreman Johnson that he had met with both the Union and OSHA earlier in the week. While Johnson testified, he never denied this conversation with Reynolds. I also credit the testimony of King who corroborated that Yocom inquired this same day as to how long Reynolds had supported the union.

Respondent asserts in its brief that Reynolds’ testimony concerning his telephone

conversation with Guida cannot be credited because it is “absurd.” Respondent argues that because of Reynolds’ poor attendance, Guida had ample justification to terminate him based solely on the record. Respondent argues, “It is simply absurd to suggest that a seasoned executive who wanted to terminate a union supporter for pretextual reasons would mention the union in the conversation in which he terminated the employee. Such a statement would provide evidence of discrimination under circumstances at which an inference of discrimination could easily have been avoided given Reynolds’ terrible attendance record.” While I agree that making such a statement was not prudent, I nevertheless find Guida’s denial lacking in credibility.

Guida testified that at a prior time, he had asked to keep a daily monitor on attendance and it was his interest to insure that the crews were fully staffed every day and on time. Respondent also argues that the attendance logs document that from the time that Reynolds was hired on June 30, 2003 until he was terminated on January 30, 2004, he missed approximately 17 full days and approximately 20 partial days. Respondent contends that the attendance logs demonstrate that Reynolds’ attendance was the worst on the job site. Although Guida contends that he was daily monitoring employees’ attendance, he did nothing to address Reynolds’ attendance until after Reynolds’ display of Union support. Respondent asserts that while Reynolds testified that 75% of his absences resulted from bad weather, there were records to document that he was absent for a number of days when the rest of his crew worked. While the records may demonstrate that Reynolds had absences in excess of the percentage that he recalled at trial, I nevertheless found him overall to be a credible witness. Crediting Reynolds and King, the record supports a finding that Respondent was well aware of Reynolds’ Union activity at the time Guida decided to terminate him. Additionally, the credited evidence supports a finding that Reynolds’ newly announced support of the Union triggered his discharge.

I also find that Respondent has failed to demonstrate that it would have terminated Reynolds in the absence of any union activity. Reynolds’ separation form indicates that he was terminated for absenteeism, had a “fair” work performance, and that he was ineligible for rehire. Respondent’s records reflect that Richard Vandenburg and Shawn Robinson were also discharged for absenteeism.¹² In contrast to Reynolds, Vandenburg’s separation notice indicates that while he was terminated for absenteeism and had a “fair” work performance, he was eligible for rehire. Robinson was also rated as “fair” in attitude, effort, and workmanship and he too was to be considered for rehire. Respondent’s records also reflect that when Anthony Redus was laid off on February 13, 2004, his notice of separation form indicated that he would not be considered for rehire. Guida testified that part of the reason for his layoff had been his unreliability. On March 28, 2004, Redus was rehired. Accordingly, based upon the record as a whole, including evidence of Respondent’s disparate treatment of other employees, I do not find that Respondent has met its burden in demonstrating that it would have terminated Reynolds in the absence of any Union activity.

¹² Vandenburg’s last day of employment was October 30, 2003 and Robinson’s last day of employment was May 20, 2004.

4. Whether Respondent Unlawfully Discharged Bob King

5 A constructive discharge is an employee's resignation that the Board considers to be a discharge because of the circumstances that surround it. The Board has held that a constructive discharge is established when it is shown that the (1) employer established burdensome working conditions sufficient to cause the employee to resign and (2) the burden was imposed on the employee because of his protected activities. *Manufacturing Services*, 295 NLRB 254, 255 (1989); *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984); *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976).
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As Counsel for the General Counsel points out in her post-hearing brief, Yocom did not seem to be aware of King's union sentiments before King attended the February 25, 2004 Union meeting. Early in February, Yocom even disclosed to King that he was looking for ways to get rid of Hammons because of Hammons' Union membership. Credible record evidence reflects, in fact, that on several occasions, Yocom shared confidences with King concerning other employees who were believed to be involved in either union or protected activity. Just prior to Estenson's reassignment and eventual layoff, Yocom confided that he would be willing to pay someone to get into a fight with Estenson as justification for firing Estenson. He also shared his plan to transfer Estenson to Barsness' crew where they could keep him on the ground and work him hard.
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Later in January, Yocom interrogated King and Reynolds as to whether they were planning to attend the scheduled union meeting. Although King denied that he was, Yocom cautioned him that if he did so, he should park away from the meeting. After Reynolds returned to work wearing the Union stickers on his hat on January 28, Yocom asked King how long Reynolds had been in the union or if he had always been in the union. Yocom also shared with King in February that he believed that Hammons and another employee were responsible for putting union stickers on the equipment.
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While King was able to conceal his support for the Union for a period of time, his true sentiments became known to Respondent by the end of February. After he attended the Union meeting on February 25, not only his crewmembers but also his foreman, Paul Johnson, began calling him "union boy." In a personal conversation in late February, King even admitted to Johnson that he supported the Union and why he did so. Johnson followed up this conversation when he invited King to play pool with him on March 5. During the conversation, Johnson asked King more about the extent of his Union membership and probed as to why he thought that the Union wanted to get involved with Respondent's worksite.
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On March 8, 2004, the first workday after King's March 5, 2004, conversation with Johnson, King's crew changed, his foreman changed, and his assignments changed. He was removed from Johnson's crew to a crew by himself and supervised solely by Curt Guida. Estenson and Hammons both testified that it was unsafe for a single employee to perform the work that King was assigned to perform by himself. King testified that the work that he was assigned to perform was physically demanding and was normally work performed by a crew of four to six people. Estenson, Hammons, Haakenson, and Reynolds corroborated his testimony. King finally quit after Guida continued to increase the number of assignments and
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to set a deadline that King believed impossible to meet.

As discussed above, there are two elements that must be proven to establish a constructive discharge. First, the burdens imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant as to force him to resign. Secondly, it must be shown that those burdens were imposed because of the employee's union activities. *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). The *Wright Line* test applies to the second element of *Crystal Princeton*. *Davis Electric Wallingford Corporation*, 318 NLRB 375, 376 (1995).

Respondent argues that there is no credible evidence that the individuals responsible for assigning work to King knew that he was affiliated with the Union at the time they made their assignments. Both Johnson and Guida denied knowing that King was affiliated with the Union or that he had been engaged in any union activities. Despite Johnson's denial however, I found King to be very credible witness. I credit his testimony that he not only disclosed his support for the Union to Johnson but that Johnson even referred to him as "union boy" along with others in his crew. I note that while there is no direct knowledge that Curt Guida, Yocom, or Roger Guida knew about King's Union support, the absence of such direct knowledge is not fatal in the *Wright Line* analysis. An employer's knowledge of union activities may be based upon reasonable inference drawn from circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941). *Greco & Haines, Inc.*, 306 NLRB 634, 634 (1992). The Board has inferred knowledge based upon such circumstantial evidence as (1) the timing of the allegedly discriminatory action (2) the respondent's general knowledge of union activities (3) animus and (4) disparate treatment. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995). The totality of circumstances, including the suspicious timing of Respondent's assignment of more onerous and even arguably dangerous duties, serves to support an inference of not only knowledge, but also discriminatory motivation.

Crediting the testimony of King and Reynolds, the record reflects that beginning in January, Yocom set out to determine whether King had any involvement with the Union. Also crediting King, I find that Yocom threatened to fire employees for supporting the Union. Yocom told King he was looking for way to get rid of Hammons because Hammons was in the Union. Yocom also told King that the company would never recognize the Union, even if a majority of the employees voted for it. Earlier in October, Yocom told King about his plan to move Estenson and to "work him hard" because Yocom believed him to be associated with the Union. Accordingly, I find that General Counsel has established a *prima facie* case that King was constructively discharged because of his Union sentiments.

Relying upon the testimony of Curt Guida, Respondent contends that King was not required to work alone after March 8. Guida testified that from the time that he came on the project until the time that King left March 30, he worked on the project with King for approximately 60 percent of the time. Guida, in fact, testified, "I was there the whole time of this wall building." While Guida testified that he worked side by side with King setting the wall forms, he also asserted that he and other employees have often constructed such walls alone without assistance.

I do not find Guida's testimony credible. While he repeatedly asserted that he and other employees assisted King in building the wall, he never identified any other employee who allegedly assisted King. He referenced only that he and King were usually assisted by "a couple of laborers." I also find Guida's testimony lacking in credibility with respect to King's assignment for the time period in issue. Guida transferred into the SWWTP project from Respondent's Fraser, Colorado project where he had been superintendent. He testified that when he arrived at the Springfield, Missouri project he joined Paul Johnson's crew as a co-foreman. Neither Guida nor any other Respondent witness provided any plausible explanation for why two foremen were needed for a crew of six employees. Johnson recalled that approximately two weeks before King's resignation, King left his crew to go with Guida for a new project. Yocom, however, testified that he moved the entire crew to the partial flume area to work under the direction of Curt Guida. He could not, however, recall when he had done so. While Respondent's witnesses are inconsistent with respect to King's last assignment, King and Haakenson were much more specific and detailed in their testimony concerning King's assignment to work alone. While Haakenson was a part of the same crew with King, Haakenson did not corroborate Guida's testimony that Guida was a co-foreman over the crew with Johnson. He also credibly testified that King was moved away from the crew to work by himself performing work as a one-man crew.

Both Yocom and Guida testified that the work King began after his reassignment from Johnson's to Guida's crew was no less desirable than the work he'd done previously. In contrast, Estenson, Reynolds, Hammons, and Haakenson all testified that performing these tasks alone would be not only unsafe but also difficult to accomplish. The description of the work given by General Counsel's witnesses is further bolstered by the pictures of the wall that King built, which were introduced into evidence.

Counsel for Respondent argues in his brief that King did not take any steps to remedy the alleged discrimination. He argues that King neither complained to Johnson and Guida nor to Respondent's office in Fargo about the work to which he was assigned, citing *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976). Accordingly, Respondent argues that because King failed to take these reasonable steps, he cannot claim to have been constructively discharged, as a matter of law. I find no Board precedent that requires an employee to protest or complain about a discriminatorily motivated change in work assignments in order to bring the employee within the protection of the Act.

Respondent additionally contends that King quit his employment because he was annoyed that Respondent had taken a large deduction from his paycheck to rectify a payroll error. Respondent further argues that King quit on March 30 because he and Haakenson had a prior agreement to quit together. While both King and Haakenson resigned on the same day, I do not find their doing so to diminish the evidence of King's constructive discharge. King credibly testified that he made his decision to resign independent of Haakenson, and that he did so because Respondent was making his working conditions so difficult.

Based upon the record as a whole, Respondent has not met its burden of proof as required by *Wright Line*. For the reasons stated above, I find that Respondent imposed a change in working conditions for King that was intended to cause his resignation and that

Respondent imposed these changes as retribution for his union activity. *FiveCAP, Inc.*, 332 NLRB 943 (2000). Accordingly, I find that King was constructively discharged in violation of Section 8(a)(3) and (1) of the Act.

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Conclusions of Law

1. Respondent, John T. Jones Construction, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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2. By threatening employees with more onerous working conditions because they participated in union or other protected concerted activities, and in order to cause employees to quit, Respondent violated Section 8(a)(1) of the Act.

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3. By asking employees to confiscate the camera of another employee, in order to prevent employees from engaging in union or other protected concerted activities, Respondent violates Section 8(a)(1) of the Act.

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4. By giving employees the impression that an employee was punished because of the employee's union and/or protected activities, Respondent violated Section 8(a)(1) of the Act.

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5. By interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees, Respondent violated Section 8(a)(1) of the Act.

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6. By creating among its employees the impression that their union or other protected concerted activities are under surveillance, Respondent violated Section 8(a)(1) of the Act.

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7. By telling employees that they or other employees had been terminated because they engaged in union or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

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8. By spitting at employees because they engaged in union or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

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9. By telling employees that they will be terminated because they engage in union or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

10. By telling employees that it would be futile to select the Union as their collective bargaining representative, Respondent violated Section 8(a)(1) of the Act.

11. By photographing picketers and engaging in surveillance of employees engaged in union or other protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

12. By assigning employees more onerous working conditions because they engaged in union or other protected concerted activities, Respondent violated Sections 8(a)(3) and (1) of the Act.

5 13. By laying off employees because they engaged in union or other protected concerted activities, Respondent violated Sections 8(a)(3) and (1) of the Act.

10 14. By discharging employees because they engaged in union or other protected concerted activities, Respondent violated Sections 8(a)(3) and (1) of the Act.

15 15. By constructively discharging employees because they engaged in union or other protected concerted activities, Respondent violated Sections 8(a)(3) and (1) of the Act.

15 Remedy

20 Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

25 The Respondent having discriminatorily discharged Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

30 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:¹³

ORDER

35 The Respondent, John T. Jones Construction Co., Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

40 (a) Threatening employees with more onerous working conditions because they participated in union or other protected concerted activities.

45 (b) Asking employees to confiscate the camera of another employee, in order to prevent employees from engaging in union or other protected concerted activities.

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Giving employees the impression that an employee was punished because of the employee's union and/or other protected concerted activities.

5 (d) Interrogating employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

(e) Creating among its employees the impression that their union or other protected concerted activities are under surveillance.

10 (f) Spitting at employees because they engage in union or other protected, concerted activities.

15 (g) Telling employees that they or other employees will be terminated because they engage in union or other protected concerted activities.

(h) Telling employees that they or other employees had been terminated because they engaged in union or other protected concerted activities.

20 (i) Telling employees that it would be futile to select the Union as their collective-bargaining representative.

25 (j) Photographing picketers and engaging in surveillance of employees engaged in union or other protected concerted activities.

(k) Assigning employees to more onerous working conditions because of their union or other protected concerted activities.

30 (l) Discharging and/or laying off employees because they engage in union or other protected concerted activities.

35 (m) Constructively discharging employees because they engage in union or other protected concerted activities.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

40 2. Take the following affirmative action necessary to effectuate the policies of the Act:

45 (a) Within 14 days from the date of this Order, offer Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed. Make Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King whole for any loss of earnings and any other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Springfield, Missouri copies of the attached notice marked “Appendix.”¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2003.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

¹⁴ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**” shall read “**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**”

APPENDIX

NOTICE TO EMPLOYEES

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**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

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WE WILL NOT threaten our employees with more onerous working conditions because they engage in union or other protected concerted activities.

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WE WILL NOT ask our employees to confiscate the camera of another employee, in order to prevent employees from engaging in union or other protected concerted activities.

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WE WILL NOT engage in conduct that gives our employees the impression that an employee was punished because of the employee's union or other protected concerted activity.

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WE WILL NOT interrogate our employees about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees.

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WE WILL NOT engage in conduct that creates among our employees the impression that their union or other protected concerted activities are under surveillance.

45

WE WILL NOT tell our employees that they or other employees have been terminated because they engaged in union or other protected concerted activities.

WE WILL NOT tell our employees that they or other employees will be terminated because they engage in union or other protected concerted activities.

WE WILL NOT tell our employees that it would be futile to select the Carpenters' District Council of Kansas City & Vicinity, affiliated with United Brotherhood of Carpenters and Joiners of America, AFL-CIO or any other union as their collective bargaining representative.

WE WILL NOT spit at employees who engage in union or other protected concerted activities.

WE WILL NOT photograph or engage in surveillance of employees engaged in union or other protected concerted activities.

5 **WE WILL NOT** assign employees more onerous working conditions because they engage in union or other protected concerted activities.

WE WILL NOT layoff off employees because they engage in union or other protected concerted activities.

10 **WE WILL NOT** discharge employees because they engage in union or other protected concerted activities.

15 **WE WILL NOT** constructively discharge employees because they engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

20 **WE WILL**, within 14 days from the date of the Board’s Order, offer Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

25 **WE WILL**, make Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

30 **WE WILL**, within 14 days from the date of the Board’s Order, remove from our files any reference to the unlawful discharges of Brian Estenson, Ryan Reynolds, Sterling Jason Hammons, and Bob King, and **WE WILL**, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

35

JOHN T. JONES CONSTRUCTION CO., INC.

(Employer)

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Dated _____ By _____
(Representative) (Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional office set forth below. You may also obtain information from the Board’s

website: www.nlr.gov.

8600 Fairley Street, Suite 100
Overland Park, Kansas 66212-4677
(913) 967-3000, Hours: 9:15 a.m. to 5:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (913) 967-3005.